Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-496

BENSON A. WOLMAN, *et al.*,

Appellants,

—v.—

MARTIN W. ESSEX, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

REPLY BRIEF FOR APPELLANTS

JOSHUA J. KANCELBAUM
2121 The Illuminating Building
Cleveland, Ohio 44113
(216) 781-5245

NELSON G. KARL
American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215
(614) 228-8951

DONALD M. ROBINER
1700 Investment Plaza
Cleveland, Ohio 44114
(216) 696-4666

JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, New York 10016
(212) 725-1222

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-496

BENSON A. WOLMAN, et al.,

Appellants,

-vs-

MARTIN W. ESSEX, et al.,

Appellees.

On Appeal From The United States District Court
For The Southern District of Ohio
Eastern Division

REPLY BRIEF FOR APPELLANTS

Introduction

Because of limitations of time and a desire for brevity, appellants, in this reply brief, will respond only to certain salient points urged by the appellees. As to points not discussed herein, appellants rely on their brief-in-chief. The two classes of appellees who have filed separate briefs, namely the state defendants-appellees and appellees Grit, et al. (parents of nonpublic school pupils), will generally be referred to respectively as the "state defendants" and the "Grit defendants."

Argument

I.

It is essential that the Establishment Clause validity of parochial aid measures such as SB 170 be assessed facially with a view to their potential for abuse; the alternative is excessive judicial entanglement.

A central issue in this case is the extent to which actual instances of inculcation of religion by state paid personnel and actual instances of intrusive entanglement must be shown before the federal courts can move to invalidate a measure such as SB 170 on Establishment Clause grounds. The Grit defendants strenuously assert that appellants go beyond the stipulated record when they express fear that this Act will create public annexes to church-related schools, religious infusion in purportedly secular services, and religious diversion of materials and equipment furnished by the state (see for example, Grit Brief, p. 11). To the contrary, appellants are doing no more than exploring the reasonable inferences from the statute and the record concerning potential for abuse.

At the threshold it must be remembered that the stipulation, insofar as it deals with the manner of the Act's implementation, expressly provides that the "new law has not been implemented ... Thus, the stipulation can only go to the intent and policies of the Department of Education rather than to the precise manner in which that intent of policy will or will not be carried out in all instances." (A. 49 S. 39).

At least since this Court's decision in Lemon v. Kurtzman, 403 U.S. 602 (1971), this Court has measured statutes which aid non-public elementary and secondary education by their potential for Establishment Clause abuse, rather than by their demonstrated record of abuse. To be sure, as the Grit defendants point out (Grit Brief, pp. 11-12), in cases involving aid to colleges and universities, where prospects for sectarian influence and excessive entanglement were otherwise held to be remote, this Court has declined to strike down laws based upon the mere "possibility" of unconstitutional application. See Tilton v. Richardson, 403 U.S. 672, 679 (1971); Roemer v. Board of Public Works, 426 U.S. 736, 96 S. Ct. 2337 (1976). And given the fact that the Federal Elementary and Secondary Education Act (28 U.S.C. §241(a) et seq.) does not itself mandate particular programs, this Court declined to consider its constitutionality based upon "hypothetical facts." Wheeler v. Barrera, 417 U.S. 402, 426-27 (1974). The history of private grade school litigation under state laws has been different.

In Levitt v. Committee for Public Education, 413 U.S. 472 (1973) it was not shown that the teacher-prepared tests paid for by the state were, in particular instances, skewed to a sectarian end. Nor was it established in Meek v. Pittenger, 421 U.S. 349 (1975), that projectors and maps furnished by the state were in a given situation employed in teaching religion; or that remedial reading teachers in a certain school taught dogma. The key to these decisions, and others like them, was that where there is a "potential for impermissible fostering of religion ... [t]he State

must be certain ... that subsidized teachers do not inculcate religion ..." Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971). "[A]ssistance of the sort here involved carries grave potential for entanglement ..." Committee for Public Education v. Nyquist, 413 U.S. 756, 794 (1973).

> "We need not decide whether substantial state expenditure to enrich the curricula of church-related elementary and secondary schools ... necessarily results in the direct and substantial advancement of religious activity. For decisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." Meek v. Pittenger, 421 U.S. 349 at 369 (1975) (Emphasis added, footnote deleted.)

Although the placement of the burden on the state to "ensure" against constitutional violations may be somewhat unusual, it is absolutely essential to the life of the Establishment Clause that the burden be placed there, and that this Court continue to entertain facial attacks upon statutes which threaten to breach the wall of separation with regard to the potential of such statutes for abuse.

An important reason for the necessity of this Court's laying down broad and clear facial rulings based on potential First

Amendment abuse in cases such as this is the unique character of the injury suffered by the statute's challengers, and the corresponding unique character of their standing.

The gravamen of the plaintiffs' complaint in cases such as this is that tax monies are being spent in violation of the religion clauses. See Flast v. Cohen, 392 U.S. 83, 103 (1968). Although this Court has acknowledged the sufficiency and importance of this nexus for federal standing (ibid.), it is clear that persons who would assert their right to prevent violations of the Establishment Clause face unusual problems. Unlike a person who has been unlawfully arrested or deprived of property without due process, the citizen whose taxes are subverted by an unconstitutional application of a broadly framed parochial aid law will not be likely to learn of the violation of his rights automatically or easily. The trend exemplified by this Ohio scheme is to scatter the administration of the state program among the hundreds of local school districts and to keep minimal records of how the funds are spent. The expenditures for particular items of equipment, and the manner in which services are rendered, will not be highly visible. A citizen in Cleveland is likely to have considerable difficulty determining whether his rights are being violated by practices in a rural school district hundreds of miles distant. The situation is exacerbated by the fact that the direct parties to the transaction by which the First Amendment may be abridged will conspire and cooperate in keeping as low a profile as possible in the rendition of these services. The nonpublic school administrations will do so in self-interest, and the public school authorities will do

so in order to avoid controversy and yield to sectarian pressure.

This pattern is well illustrated by the manner in which SB 170 is now being implemented. After this case was set for argument, appellants approached the Ohio Department of Education in order to determine how funds were being allocated to various programs under the Act, should the question arise during argument. Appellants learned that until long after the funds have been spent, the only centrally collated information is a computer printout indicating the allocation to the school district, and identifying the nonpublic schools to which the aid is directed and their enrollment.[1/] A sample page of this printout is attached to this brief and marked "Appendix A". Any further collation of information at the state level will only occur after the materials are loaned, the services rendered, and the appropriation exhausted. At that point, whatever violations of the First Amendment are involved shall have already occurred and those who object shall face the hapless and arduous task of seeking to recover the funds. Cf. Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II).

In a somewhat comparable situation where victims of constitutional violations often have difficulty discovering the extent of their deprivations, i.e., racial discrimination, it has been necessary to create elaborate investigative agencies such as the EEOC and the state civil rights commissions to ferret out the facts. No

1/ Although defendants urge the benefits are not to the school, significantly, the allocation is ultimately on a school-by-school basis.

such agencies exist to enforce the Establishment Clause, and if they did they might well pose their own problems of entanglement. The only viable means of safeguarding the Establishment Clause is for this Court to continue to strike down laws which do not of themselves ensure against sectarian abuse.

If these laws are to be tested only as applied, under the philosophy that abuse should not be anticipated, the number of lawsuits will proliferate and the issues resolved will be much narrower, for the plaintiffs will have no comfortable choices. They will either have to give up the struggle to preserve church-state separation, or they will have to monitor these programs through the discovery processes of the courts. If the latter event should occur, a new form of unfortunate entanglement will have been engendered -- judicial entanglement. The specter of an endless parade of clerical and educational personnel across the witness stands to testify to their practices is not a comfortable one. [2]/

However, in spite of the inevitable increase in litigation which would be spawned by a deferral of constitutional adjudications in this area, millions of dollars will ineluctably be misspent before constitutional abuses can be corrected. See Lemon v. Kurtzman II, supra. And, the limited

[2]/ The necessity of avoiding the pinning of Establishment Clause adjudications on "variable aspects" so as to prevent "continuing day-to-day relationship" and "confrontations that could escalate" was mentioned in the opinion delivered by the Chief Justice in Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

resources of those who challenge these enactments in the interest of religious liberty will be insufficient to reach every major violation.

For the foregoing reasons, appellants urge this Court not to shrink from exploring the ways in which Ohio's latest program to aid nonpublic education can foster sectarian abuse. Such an analysis must yield the conclusion that the potential for abuse is not materially less than that which caused this Court to strike down the statute challenged in Meek v. Pittenger, supra.

II.

The character of parochial grade school education in Ohio is similar to that involved in previous decisions of this Court.

The District Court found that based upon the stipulated facts, the "character of these [nonpublic] schools is substantially comparable to that of the schools involved in Lemon v. Kurtzman, 403 U.S. 602, 615-18 (1971)" (footnote omitted). Wolman v. Essex, 417 F. Supp. 1113, 1116 (S.D. Ohio 1976). The Grit defendants now urge that in Ohio, "religion is not fused into secular courses" and that "heretofore presumed differences between elementary, secondary and higher education may need reconsideration" (Grit Brief, p. 13). The stipulation only concedes that teachers are not "required" to teach and integrate religious doctrine in secular courses; it

does not concede that secular courses are not flavored by the religious atmosphere of the institution.

An administration of the Establishment Clause which causes the constitutionality of statutory programs around the country to turn upon slight differences in the practices of various sectarian grade schools would be unworkable. These appellees seem to recognize this when they acknowledge that they seek to uphold the statute because of its secularity and not because Ohio schools do not fit a standard profile. Id. at 13, 14.

For the foregoing reasons, it must be concluded that whatever the abstract merit of the appellees' suggestion that the character of sectarian education be reconsidered, the record and the finding below [3]/ render this case a poor vehicle for such reconsideration.

III.

Appellants do not concede that all categories of assistance under the Act are severable.

The Grit defendants state that appellants have conceded "the severability of the various categories of assistance provided under the Ohio Act ..." (Grit Brief, p. 17.) Presumably some degree of

3/ That finding, by a District Court with a feel for the Ohio fact pattern, should not be disturbed unless clearly erroneous. Cf. Bishop v. Wood, 426 U.S. 341 (1976).

concession on this subject can be inferred from appellants' decision not to challenge certain programs authorized by the Act, including medical, dental and nursing diagnostic programs. However, no blanket concession as to the independent viability of every clause of the statute was intended.

In the event that this Court's decision herein results in a situation like that of Meek v. Pittenger where a minor portion of the statutory scheme remains after the major programs are stricken down, it may be appropriate for this Court either to invalidate the entire statute or to remand the consideration of the severability of the residue for further proceedings in the District Court. There may well be a First Amendment problem involved in leaving all of an Eighty-eight million dollar subsidy standing for provision of even a dental service in sectarian institutions.

IV.

Diagnostic services are not limited to the use of standard diagnostic tests.

SB 170 provides, without further definition, for the furnishing, inter alia, of diagnostic speech and hearing services and psychological services. Ohio Rev. Code §3317.06(D) and (F). The Grit defendants argue that these services merely comprise the use of standardized objective tests, citing a publication of the Ohio Department of Education ("The Intern Program in School Psychology" and "Ohio School Speech and Hearing Services", Grit Brief, pp 19-21). However, these defendants hedge their

assertions on this subject by saying that the psychologists "typically" use standardized tests (Id. at 19) and that "[i]n general" the described testing procedure is used (Ibid., quoting from "Ohio School Speech and Hearing Services"). The fact is that SB 170 does not tie these diagnostic services to specific standardized testing procedures. The sources referred to by these defendants prescribe recommended procedures; they do not limit or regulate the procedures which may be employed under the Act. Notwithstanding these references, the scheme of SB 170 relies solely upon the "good faith" of the public personnel dispatched to sectarian sites to refrain from inculcating religion. This is expressly prohibited by Meek v. Pittenger, 421 U.S. 349, at 369 (1975).

V.

> While this court's decision in this case may effectively decide the validity of certain programs which may be employed under Title I of the Federal Elementary and Secondary Education Act, the validity of that Act itself is not at issue in this appeal.

The Grit defendants urge that appellants have suggested that Meek v. Pittenger may have invalidated Title I of the Federal Elementary and Secondary Education Act. (Grit Brief, p. 24). Appellants have not done so. However, in view of the filing of briefs amicus curiae, by the United States and the State of New York, urging that this Court not adjudicate Title I in this case, appellants regard it as appropriate to

address the relationship between this case and Title I.

Obviously the law challenged in the instant appeal is an Ohio statute and not Title I. Appellants seek no judgment concerning the federal statute in this litigation, and are entitled to none. However, the same First Amendment which applies to the states via the Fourteenth Amendment does not change its wording when it applies directly to the federal government. It is difficult to understand how a remedial teacher paid by the state can be prohibited by that Amendment from performing services in a parochial school, but allowed to do so if paid under Title I. It would thus appear inevitable that the alternative methods of meeting Title I's funding condition that "comparable services" be provided to non-public school pupils, as listed in Wheeler v. Barrera, 417 U.S. 402, 425-26 (1974), must be deemed limited by Meek v. Pittenger, supra. In truncated fashion, that is all appellants meant in footnote 28 on page 42 of their brief-in-chief. [4]/

Since Title I does not mandate specific kinds of programs, but merely requires the state and local agencies to devise plans which meet the comparability criteria, it would not appear that this case will have much effect upon the facial validity of Title I. However, insofar as Title I is broad enough to encompass programs like those adjudicated under the Ohio Act here

---

[4]/ A similar conclusion is reached in Levin, Between Scylla and Charybdis: Title I's "Comparable Services" Requirements and State and Federal Establishment Clauses, 39 Duke L. J. 39, 56, 65-66 (1976).

challenged, with every respect to Amici, it is difficult to see how the ordinary principles of stare decisis can be avoided.

VI.

Prohibition of therapeutic services except as part of a general program for public and nonpublic school pupils does not involve labeling children "sectarian citizens".

The Grit defendants (while accusing appellants of emotional catchwords (see Grit Brief, p. 12), argue that nonpublic pupils would be labeled "sectarian citizens" by a rule which denies them special services at sites which, though nominally public, are not so used by public school pupils. Id. at 31. To the contrary, it is the very creation of such programs which threatens to denominate a class of sectarian citizens, for making an education center out of a firehouse for the children of only a few faiths would certainly tend to set them apart. These defendants ask "[a]re these children identifiable sectarian children when they go to the movies; when they enter the grocery store [etc.] ..." Id. at 32. (And see State Brief, p. 17). However, they do not go to such places as a group selected by the government as a result of their sectarian affiliation and practices. The way to prevent the creation of a sectarian citizenship is to insist that when pupils enrolled in parochial schools receive governmental benefits, they do so as part of a program administered for all children in a truly public and neutral place: a public school or a facility such

as a public library which is in fact, not merely in tenuous theory, available to the public for that purpose. 5/

VII.

The furnishing of equipment and materials: the lending library analogy proves too much.

The Grit defendants urge that the lending of equipment and materials for use in parochial schools will not advance religion because what is created is merely a lending library, within the church school, where public personnel lend the items directly to the pupil.

> " ... [T]he new Ohio Act very carefully spells out 'a lending library procedure' for dissemination of these materials to pupils. The new Act authorizes publicly-employed and controlled clerical personnel to administer the lending process." Grit Brief, pp. 44-45.

This argument totally undermines any effort of the defendants to minimize the central role of the public personnel who are to administer the equipment and materials program

---

5/ An example of the abuse which can occur when adjacent public and parochial facilities are employed in a manner which effectively merges them is illustrated in Moore v. Board of Education, 4 Ohio Misc. 257, 212 N.E.2d 833 (Mercer Common Pleas 1965).

on parochial premises. A "lending librarian" no less than other auxiliary personnel, would be barred from service in a sectarian institution by Meek. For such librarians perform "important educational services ..." 421 U.S. 37. However, no elaborate analysis is necessary to buttress the conclusion that there is something wrong, in Establishment terms, with a state lending library being maintained inside a place of worship or its educational arm.

However, the analogy between the lending library and the equipment and materials loan is also factually inaccurate. As appellants pointed out at length in their brief-in-chief (pp. 21, 31), the list of available materials and equipment includes a large proportion of items which will be loaned to the class as a group (A. 67-71, Exhibit D). These items will simply not be returned to their public custodians until they are worn out or obsolete.

Interestingly, the state defendants who are charged with the administration of the Act, contradict the parental defendants on this point. They admit that they do not contend

> " ... that there is no distinction between textbooks and materials and equipment. The General Assembly obviously felt there was a distinction between these items or it would not have made separate provisions for them in the statute." State Brief, p. 10.

Moreover, while the Grit defendants mention a list of educational devices

ascribed to be usable by individual pupils (Grit Brief, pp. 46, 48) only a few of these items (i.e., tachistoscopes and rotomatics) are mentioned among the stipulated examples of available aid set forth at Exhibit D (A. 67-71). And even if children use these expensive pieces of electronic equipment and devices one at a time, the analogy to the loan of textbooks which a child carries to and from class and often takes home, is far-fetched. The devices to be loaned under this Act are school equipment. But for the perceived need of the defendants to circumvent the First Amendment, no one would think of calling the process of making them available to pupils a "loan to the pupils."

In evident recognition of the impossibility of sustaining SB 170's loan clauses as limited to individual use items, the state defendants argue that "[w]hether or not a piece of instructional material is distributed to an individual pupil ..." should not matter (State Brief, p. 13). However, this line of reasoning would lead to the conclusion that any item which benefits the child is immunized from Establishment Clause attack under the child benefit theory. This conclusion was rejected in Committee for Public Education v. Nyquist, 413 U.S. 756, 785 (1973).

The Grit defendants, quoting from the transcript of testimony in the trial of POAU v. Essex, 28 Ohio St.2d 79 (1971) (which transcript is not a part of the record in this case, see pp. 20-21, infra.), point out that the services and materials provided under the Ohio statute would not otherwise be available (Grit Brief,

pp. 26-27, 49-50). These defendants thereby admit that these items cannot be analogized to transportation and textbooks, which have generally been supplied for parochial pupils, frequently by parents. See Meek v. Pittenger, supra, 421 U.S. at 361 n. 10. Contrary to the State defendants' assertion (State Brief, p. 13), appellants do not agree that supplanting a benefit previously supplied by the parents necessarily makes the beneficiary the child rather than the school. However, where the benefit is an item which, if furnished at all, would be furnished by the institution, the child benefit theory would equally justify total subvention of the parochial education process as Mr. Justice Black warned in Board of Education v. Allen, 392 U.S. 236, 253 (1968). See also, Committee for Public Education v. Nyquist, supra, 413 U.S. at 782 n. 38.

VIII.

Field trip busing fosters excessive entanglement.

The Grit defendants argue that excessive entanglement is avoided under the Act's provision for field trip transportation because the buses are idle during the school day (Grit Brief, p. 53), so that scheduling conflicts will not occur. Even if this unsupported allegation is accepted, in an age of fuel shortages it is unrealistic to suppose that there will be unlimited availability of buses for all public and private schools whenever a field trip is desired, and however long the trip. Competition for available transportation funds would appear inevitable and under the Ohio Act, there

are only two possibilities. If the district transportation coordinator asserts authority to refuse a transportation request, 6/ pressure against such a decision will be applied from sectarian institutions. If the Act is interpreted as requiring him to honor each request for transportation, the unilateral determination of the sectarian school authorities will control the amount of expense incurred by the public for this program. In either instance, potential excessive entanglement is patent.

IX.

Standardized tests are for the use of the school administrations, and not merely for the monitoring of state minimum standards.

The State defendants argue that standardized tests, which are stipulated to "measure the progress of students in secular courses" (A. 48 S. 37), are merely a method of determining whether state minimum curricular standards are being met. Such tests are generally employed by the teachers and staff to evaluate the progress of individual pupils. Parochial schools have been chartered in Ohio for many years without the necessity of the state's paying for their testing programs. And if the state deems it necessary that standardized tests be given in order to maintain licensure, no corresponding obligation is imposed on the state to pay for the tests. See p. 19, infra. Testing remains an integral part of the

---

6/ SB 170 does not specify whether he has such discretion.

education process which, in sectarian schools, cannot be publicly funded. See Levitt v. Committee for Public Education, 413 U.S. 472 (1973).

X.

Invalidation of SB 170 will not violate the Free Exercise Clause.

The defendants argue that the government may not deny the auxiliary benefits afforded under this statute to children enrolled in parochial schools without violating the Free Exercise Clause. (Grit Brief, pp. 31-34, State Brief, p. 17). Rejecting a similar argument, the District Court for the Southern District of Ohio noted that the Free Exercise Clause "has never been interpreted as placing an affirmative duty upon the state to appropriate money so that religious beliefs might be more effectively exercised ..." Kosydar v. Wolman, 353 F. Supp. 477 (S.D. Ohio 1972), aff'd sub nom. Grit v. Wolman, 413 U.S. 901 (1973). See also Brusca v. Missouri ex rel. State Board of Education, 332 F. Supp. 275 (E.D. Mo. 1971), aff'd 405 U.S. 1050 (1972). And, "a state could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might be best achieved by withholding all state assistance." Norwood v. Harrison, 413 U.S. 455, 462 (1973).

In short, if it is invalid under Establishment Clause tests, the Ohio enactment cannot be saved by reference to the Free Exercise Clause. The defendants' proposed construction would "for all practical purposes, render meaningless the thrust and

import of the Establishment Clause." Kosydar v. Wolman, supra, 353 F. Supp. at 764.

XI.

Defendants rely upon materials not in the record.

Although the Grit defendants chide appellants for going beyond the record (for example, Grit Brief, p. 11)--when appellants were merely arguing inference from the stipulations concerning the potential of the statute for sectarian abuse--these defendants themselves have sought to enlarge the record by quoting at length from the transcript in POAU v. Essex, 28 Ohio St.2d 79 (1971). As Appellants explained in their "Brief in Opposition to Motion to Dismiss or Affirm and in Opposition to Motion to Affirm" (at pp. 3-4) in their last previous appeal to this Court, Wolman v. Essex, No. 74-339, these appellants were not parties to POAU v. Essex. They had brought their own action against the predecessor statute, and their motions to intervene in or consolidate with the POAU suit were denied, whereupon they dismissed their action without prejudice. Having been denied the opportunity to cross examine the witnesses whom the Grit defendants now quote, they should not be saddled with the burden of rebutting their testimony in another action to which they were not parties, which testimony is not part of the record in this case.

Furthermore, if the record in POAU v. Essex were to be explored, other portions of the testimony should be explored, including

the grudging admissions of Ohio parochial school representatives that sectarian influences invade secular curriculum (for example, Transcript, pp. 134-36). Under ordinary precepts of appellate review, this case should be heard on its own record, and not that of other litigation between other parties.

Conclusion

The Grit defendants conclude their presentation by referring to "a ten-year history of a remarkably successful auxiliary service program ... which has been implemented without evidence of political divisiveness along religious lines." Appellants do not comment upon the success of the program from an educational standpoint, because that is not what is at issue here. From an Establishment Clause point of view, that ten-year history has been a disaster rather than a success. Until August of 1975, when the current statute was adopted, that program was administered under a statute which was constitutionally indistinguishable from that stricken down in Meek v. Pittenger. Many millions of dollars have thus been expended in violation of appellants' First Amendment rights. Nor has there been a lack of political divisiveness. In Ohio, as elsewhere, groups have formed on both sides of these issues (as evidenced by the amicus participation in this case) who have sought, often bitterly, to impress their points of view upon the legislature and the courts. If the divisiveness has been controlled in any measure, that control has been achieved principally by the decisions of this Court which have preserved separation between church and state. Those

decisions have given proponents of separation reason for patience and hope that divisive political action may yet prove unnecessary; and those decisions have set limits upon what the proponents of full governmental subsidization of religious education may credibly demand.

The words of Mr. Justice Rutledge, dissenting in Everson v. Board of Education, 330 U.S. 1, 53 (1947) remain pertinent:

> "The reasons underlying the [First] Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting."

For the foregoing reasons, appellants respectfully urge this Court to reverse the decision of the District Court.

Respectfully submitted,

JOSHUA J. KANCELBAUM
2121 The Illuminating Bldg.
Cleveland, Ohio 44113
(216) 781-5245

NELSON G. KARL
American Civil Liberties
Union of Ohio Foundation,
Inc.
203 East Broad Street
Columbus, Ohio 43215
(614) 228-8951

DONALD M. ROBINER
1700 Investment Plaza
Cleveland, Ohio 44114
(216) 696-4666

JOEL M. GORA
American Civil Liberties
Union
22 East 40th Street
New York, New York 10016
(212) 725-1222

Attorneys for Appellants

APPENDIX

REGION SEQUENCE

STATE OF OHIO
DEPARTMENT OF EDUCATION-DIVISION OF SCHOOL FINANCE
AUXILIARY SERVICES MAXIMUM ALLOCATION REPORT 1976-77 AT $174.29 PER PUPIL (ACTUAL FOR FY77)

COLUMBUS CITY S.D. FRANKLIN COUNTY REGION: 06

		ADM	MAX ALLOCATION	PUB IRN	NON-PUB IRN
0 2502701A06	CORPUS CHRISTI	276	$48,104.04	043802	057596
0 2502701A07	ST FRANCIS DE SALES	851	$148,320.79	043802	053587
0 2502701A10	HOLY NAME	184	$32,069.36	043802	057612
0 2502701A12	IMMACULATE CONCEPTION	348	$60,652.92	043802	057661
0 2502701A13	OUR LADY OF PEACE	224	$39,040.96	043802	057687
0 2502701A14	ROSEMONT	118	$20,566.22	043802	053496
0 2502701A16	NOTRE DAME	231	$40,260.99	043802	057752
0 2502701A18	ST ANTHONY	273	$47,581.17	043802	057786
0 2502701A19	ST AUGUSTINE	262	$45,663.98	043802	057802
0 2502701A20	ST CATHARINE	204	$35,555.16	043802	057844
0 2502701A21	TRINITY	149	$25,969.21	043802	057869
0 2502701A24	ST GABRIEL	212	$36,949.48	043802	057893
0 2502701A25	ST JAMES THE LESS	512	$89,238.48	043802	057901
0 2502701A27	ST JOSEPH ACADEMY	161	$28,060.69	043802	057950
0 2502701A28	ST JOSEPH ACADEMY	95	$16,557.55	043802	053710
0 2502701A29	ST LADISLAS	236	$41,132.44	043802	057968
0 2502701A30	ST LEO	199	$34,683.71	043802	057976
0 2502701A31	ST MARY	211	$36,775.19	043802	058008
0 2502701A32	ST MARY MAGDALENE	357	$62,221.53	043802	058057
0 2502701A33	ST MATTHIAS	256	$44,618.24	043802	058073

A1